No. 98-5864

In The

Supreme Court of the United States

October Term, 1998

TOMMY DAVID STRICKLER,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. Given that he failed to raise his so-called *"Brady"* claim in state collateral proceedings and that the claim would be barred if raised in state court now, may petitioner establish "cause" to excuse his default when he clearly could have pursued and raised the claim in his state collateral proceedings just as he subsequently did in his federal habeas proceeding?

II. Even if petitioner could show "cause" for his default, is a finding of the required "prejudice" precluded by his trial attorney's actual knowledge of the substance of the allegedly undisclosed impeachment material, by Strickler's admissions to the jury, a probation officer and the trial judge, and by the Court of Appeals' reasonable conclusion that the undisclosed material, if disclosed, would not have made a difference in the outcome of petitioner's trial?

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STATEMENT OF THE CASE

Nine years ago, Tommy Strickler murdered Leanne Whitlock, a 19-year-old black college student, after abducting her from the Valley Shopping Mall in Harrisonburg, Virginia, and after robbing her while armed with a deadly weapon. Strickler and his accomplice, Ronald Henderson, killed Whitlock by dropping a 69-pound rock on her head four times, crushing her skull so forcefully that bone fragments were embedded in her brain. Whitlock's frozen, nude body was found hidden in an Augusta County field eight days after her abduction.

A. Strickler's guilt was established overwhelmingly by the evidence independent of the testimony of Anne Stoltzfus:

The uncontested evidence at trial showed that at about 4:30 p.m. on January 5, 1990, Whitlock borrowed John Dean's 1986 blue Mercury Lynx automobile which bore West Virginia tags "NKA 243." At the time Whitlock borrowed the car, it was clean and Whitlock agreed to return it to Dean "an hour or two later" at the Valley Mall where Dean worked at the Footlocker Store. (JA 18). After borrowing the car, Whitlock, accompanied by her roommate, ran errands culminating in a take-out cheeseburger and french fry dinner at about 6:00 p.m. The roommates returned home to eat, and at approximately 6:30 to 6:45 p.m. Whitlock left her apartment to return the borrowed car to Dean at the mall. (JA 22-23). She was wearing a pair of pearl earrings that belonged to her mother. After leaving the apartment that evening, neither her roommates nor Dean ever saw Whitlock alive again and Whitlock did not return Dean's car as scheduled. (JA 18, 23, 25).

Strickler's mother, Irene Silvious, testified that on January 5 she left her home in New Market, Virginia, to

go into Harrisonburg to do her banking. She was accompanied by Strickler and his friend, Ronald Henderson. (JA 149). Strickler and Henderson, however, disappeared when she parked her car at the bank and she did not see them again that day. According to Silvious, Strickler "always" carried with him a hunting knife which had been given to him by his father. (JA 149).

Strickler and Henderson subsequently were seen at the Valley Mall by Virginia Smith, a mall security guard, and by Donna Warner, a friend of Henderson's who was shopping at the mall. (JA 27-28, 32). Smith testified that at approximately 3:30 p.m. on January 5 she received a report that two white males, later identified as Strickler and Henderson, were attempting to steal a white Continental from the mall parking lot. By the time Smith reached the location of the white Continental, however, Strickler and Henderson had fled. After searching throughout the mall, Smith located Strickler and Henderson and she spent the remainder of the afternoon watching them. At about 6:45 p.m., however, the pair apparently noticed Smith watching them and they "took off out of the food court" toward the main entrance of the mall. Smith subsequently lost sight of the pair and she did not see them again that evening. (JA 28-33).

Kurt Massie testified that at about 7:30 p.m. on January 5 he was traveling on Route 340 in Augusta County when he saw Strickler driving a dirty blue car. Massie saw three people in the vehicle, although he acknowledged that there may have been a fourth occupant in the car. His attention was drawn to the car because it was turning onto a dirt road which led into a field and this was an area where Massie knew vehicles often became stuck. Massie stopped and watched Strickler because he thought that he would have to help Strickler dislodge his car once it got stuck. The car, however, had no apparent

difficulty negotiating the dirt road and Massie continued on his way. (JA 64-69).

Later that same evening, Carolyn Brown, Debbie Sievers and Nancy Simmons were at Dice's Inn, a bar in Staunton, Virginia.[1] (JA 73, 78, 80). Also at Dice's was Donna Kay Tudor. At approximately 9:00 p.m., Strickler and Henderson entered Dice's.[2] Brown, Sievers and Tudor testified that when Strickler arrived at Dice's his jeans were dirty and Tudor saw blood on them.[3] (JA 75, 79, 81, 95). While at Dice's, Strickler spent most of his time with Tudor; Henderson spent his evening with Simmons. Simmons testified that at some point during the evening Henderson gave her Whitlock's watch as a gift. (JA 82). According to Sievers, Strickler and Henderson left Dice's around 2:00 a.m. with Tudor in a vehicle Sievers identified as Dean's blue Lynx. (JA 77).

Tudor testified that she met Strickler and Henderson at Dice's and, after spending the evening with Strickler, left with the two men to search for marijuana. As they drove around, she sat in the back seat of the car while Henderson and Strickler sat in the front seat. During the drive, Strickler became angry at Henderson for driving erratically, pulled a knife and threatened to stab Henderson. Tudor also overheard a conversation between the

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[1] Staunton is surrounded by Augusta County and is approximately 25 miles from Harrisonburg.

[2] The evidence established that Tudor already was at Dice's before Strickler and Henderson arrived. Sievers, Brown and Simmons all testified that Tudor was at Dice's by 8:00 p.m. – over an hour before Strickler and Henderson arrived. (JA 76, 81). Tudor testified that she was dropped off at Dice's around 8:00 p.m. and that she encountered Strickler after she arrived. (JA 89).

[3] The blood later was determined to be type "O" – common to both Whitlock and Strickler.

men in which they were discussing a "fight" which had occurred earlier that evening. Specifically, they talked about getting into a fight with "it" and they referred to "it" as a "nigger." They additionally talked about how they had kicked "it" in the side of the head and Tudor heard Strickler state that he had used a "rock crusher" on "it" so that "it" would "give him no more trouble." (JA 91-93, 96).

Sometime after this conversation, Strickler and Tudor dropped Henderson off, and Strickler and Tudor drove to Virginia Beach in the stolen blue Lynx. On the trip to Virginia Beach, Strickler gave Tudor the pearl earrings Whitlock had been wearing when she disappeared on January 5. (JA 96). Also during this trip, Tudor noticed Whitlock's driver's license, I.D. and bank card in the car, and Tudor testified that Strickler attempted unsuccessfully to use the bank card in Virginia Beach. (JA 96). In what the Virginia Supreme Court later described as a "transparent falsehood," Strickler told Tudor he had bought the car from "some man . . . for five hundred [dollars]." (JA 96).

Strickler and Tudor returned to the Augusta County area on January 10 or 11, 1990. Once back in the area, the blue Lynx broke down. Strickler pushed the car out of the road and abandoned it. (JA 97). Strickler and Tudor proceeded to his mother's house in New Market, where Strickler washed his bloody jeans and directed Tudor to dispose of a brown paper bag containing Whitlock's identification. (JA 95, 147). The car was recovered by the police and was positively identified as John Dean's car that he had lent to Whitlock on the afternoon of January 5. Strickler's fingerprints and footprints were found on both the inside and outside of the vehicle. (JA 99, 128-129).

On January 13, 1990, Daniel Holsinger was farming in the field off Route 340 into which Kurt Massie had seen Strickler driving the blue Lynx on the night of January 5. As Holsinger and his sons harvested corn, one of the boys discovered a wallet belonging to Ronald Henderson. After seeing Henderson's picture on the television news, Holsinger contacted the police. (JA 85-88). When the police searched the field where the wallet had been found, they discovered Whitlock's frozen, battered body hidden behind a mound of logs, twigs and dirt. Near the nude body was a 69-pound rock spotted with human blood. (Trial Tr. 6-18-90 at 587-588).

A forensic pathologist determined that Whitlock's death was due to "multiple blunt force injuries to the head with depressed skull fractures and lacerations of the brain" (JA 109), consistent with having been inflicted by the blood-stained rock found near her body. The pathologist testified that, based upon the undigested hamburger, cheese, pickle and french fry material found in Whitlock's stomach, "death occurred, at an absolute maximum, six hours after she ate and probably much less than that," perhaps as little as an hour or two. (JA 112).

Finally, the Commonwealth presented evidence that Caucasian head hairs found on Whitlock's shirt and bra were "microscopically alike in all identifiable characteristics" to Strickler's and had been "forcefully removed" from the donor's head. (JA 136). Semen consistent with Strickler's was found on the shirt Strickler was wearing on January 5 and vaginal swabs taken from Whitlock's body also showed the presence of semen, although its type could not be identified.

B. Anne Stoltzfus' testimony:

Anne Stoltzfus testified that she had been shopping at the Valley Mall with her 14-year-old daughter on January 5, 1990 when she encountered Strickler, Henderson and a "blonde woman" at a music store at approximately 6:00 p.m. Her attention was drawn to Strickler because he appeared "revved up." (JA 36). Stoltzfus admitted that her memory of how the trio was dressed was "a little vague." (JA 37). According to Stoltzfus, Strickler was dressed in bedraggled but "clean" jeans and was wearing a gray T-shirt with a Harley-Davidson emblem across the front. He wore a flannel shirt over the T-shirt and an embroidered denim jacket over the flannel shirt. Stoltzfus described the blonde girl as wearing "denim jeans, a white top that had buttons down the front and white sneakers." Finally, Stoltzfus testified that Henderson was wearing a light-colored shirt and neat pants. (JA 37).

The employees in the music store could not help Stoltzfus locate the particular compact disc she was looking for and she was told to return to the store at 6:45 p.m. when another clerk would be returning from his break. As she was returning to the store at about 6:45 p.m., Stoltzfus again encountered Strickler, Henderson and the blonde woman. Strickler was yelling for "Donna" and Stoltzfus asked the blonde woman if she was "Donna." According to Stoltzfus, the woman replied: "Donna" or "Sharon." Strickler then asked the blonde woman, "Where is Ronnie?" and directed her and Henderson to meet him at the bus stop. Upon the blonde woman's inquiry, Stoltzfus directed her to the bus stop at the front of the mall. (JA 38-39).

Shortly thereafter, Stoltzfus left the music store and, as she was driving through the mall parking lot, she noticed a "shiny dark blue car" driven by a black woman, whom she identified as Leanne Whitlock. Whitlock, as

well as Stoltzfus, were forced to stop for traffic. While they were stopped, Strickler approached both a mini-van that had just unloaded passengers and a white pickup truck stopped ahead of Whitlock's car and "pounded" on both vehicles. Strickler then came back and pounded on Whitlock's passenger window, opened Whitlock's car door and "jumped in" on the passenger side. He motioned for Henderson and the blonde girl to get in the car but Whitlock apparently stepped on the gas pedal causing the car to jerk forward, and they initially were unable to enter the vehicle. Whitlock then sounded her car horn but stopped when Strickler began hitting her. Henderson and the blonde girl then were able to get in the car. (JA 43-44).

Stoltzfus sounded her car horn and when Whitlock's vehicle did not move, she "pulled up parallel" with Whitlock and got out of her car. Stoltzfus tried to ask Whitlock three times if she was "O.K." Whitlock did not respond except to make "direct eye contact and then look down to her right." Whitlock also mouthed a word which Stoltzfus later thought might have been "help." (JA 45-47). At this point Whitlock's car went up over the curb and Whitlock "laid on the horn again." Stoltzfus recorded the blue car's license plate number, NKA 243, on a 3x5 card and remembered it with a trick: "No Kids Alone – 243." (JA 48). Stoltzfus saw the blue car leave the mall and head east on Route 33.

On cross-examination, Stoltzfus admitted that she never reported to the police what she had witnessed at the mall on January 5, 1990. Rather, the police approached her after she had mentioned to a classmate[4] what she had observed at the mall and the classmate

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[4] Stoltzfus, like Whitlock, was a student at James Madison University in Harrisonburg.

phoned the police. Also on cross-examination, Stoltzfus admitted that she had met with Detective Dan Claytor of the Harrisonburg Police Department a number of times prior to trial. During these meetings, she had viewed three photo line-ups and she testified that her identification of Strickler from the photos was "absolute." (JA 50-56). Finally, Stoltzfus admitted that shortly before trial she had spoken to a reporter from the Roanoke Times and World News about what she had witnessed on January 5, 1990. (JA 53).

C. Trial and direct appeal:

Prior to his trial in the Augusta County Circuit Court, Strickler did not file a motion under *Brady v. Maryland*, 373 U.S. 83 (1963), asking for exculpatory evidence in possession of the Commonwealth. Instead, Strickler took advantage of the prosecutor's open file policy and, pursuant to this policy, examined the Augusta County prosecutor's files "numerous" times. (JA 223).

At trial in June of 1990, Strickler conceded to the jury in the guilt-stage closing argument that he was guilty of abduction, robbery and first-degree murder. (JA 185, 192-193). He argued, however, that he should not be found guilty of capital murder because the Commonwealth had failed to prove that he rather than Henderson actually had dropped the rock on Whitlock's head. (JA 193). The jury rejected Strickler's argument, convicted him of capital murder and, after a separate hearing on the issue of punishment, recommended that he be sentenced to death based upon findings of both "vileness" and "future dangerousness." *See* Va. Code § 19.2-264.4. The trial judge ordered a pre-sentence report as required by Virginia Code § 19.2-264.5.

Shortly after the conclusion of the jury trial, Stoltzfus wrote a letter to the editor of the Harrisonburg Daily

News Record. The letter was published in the newspaper on July 18, 1990. In the letter, she stated that her "coherent story at trial was the result of an incredible effort by police to put a zillion little puzzle pieces into one big picture." (JA 250).

At the final sentencing hearing on September 19, 1990, the defense acknowledged that it had reviewed the pre-sentence report. Among other things, the report contained a section captioned "Subject's Version," in which Strickler admitted that he, along with Henderson, had been at the Valley Mall on January 5, that he had entered the blue Lynx at the mall and that he was present in the field at the time Whitlock was murdered. (Augusta County Circuit Court Trial Record; report filed 9-19-90).

During his allocution at the sentencing hearing, moreover, Strickler confirmed the information in the pre-sentence report:

> It's true, true I was at the mall with this individual. It is true that I was at [the murder] sight [sic] but I was told that he [Henderson] was walking her home. I sat in the car and waited . . .
>
> * * *
>
> It was only three of us (inaudible), Henderson was behind the driver's wheel, Ms. Whitlock was sitting in the back seat, I got in on the passenger side. . . .

(Trial Tr. 9-19-90 at 54-55). Strickler also admitted, just as Stoltzfus testified, that prior to entering Whitlock's vehicle he had approached a van unloading passengers at the front of the mall:

> I walked across the parking lot to a van and then come [sic] back where she indicated I was, they was [sic] stopped. At no time at the Valley Mall does traffic stop. It pulls up to the stop, to

> the sidewalk, unloads passengers but meanwhile traffic continues through (inaudible). At no time does traffic stop in mainstream.

(*Id.* at 56). After Strickler's allocution, the trial judge imposed sentence in accordance with the jury's verdicts.

On direct appeal in the Supreme Court of Virginia, Strickler raised no claim that the Commonwealth had withheld exculpatory evidence. The Virginia Supreme Court affirmed Strickler's conviction and death sentence. *Strickler v. Commonwealth*, 404 S.E.2d 277 (Va. 1991). This Court denied certiorari on November 4, 1991. *Strickler v. Virginia*, 502 U.S. 944 (1991).

D. State habeas corpus:

In December, 1991, the Augusta County Circuit Court appointed two attorneys to represent Strickler in state habeas corpus proceedings. (JA 203). Nine months later, on September 1, 1992, Strickler filed a 51-page habeas petition, which raised over 100 claims but contained no allegation that the Commonwealth had withheld exculpatory evidence at trial.

The Warden filed a motion to dismiss on November 12, 1992. In response to an allegation that trial counsel were ineffective for failing to file a *Brady* motion, the Warden asserted that, because "counsel were voluntarily given full disclosure of everything known to the government[,] there was no need for [trial counsel to file] a formal motion." (JA 212). In addition, the Warden asserted that Strickler could not establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) because, by virtue of the prosecutor's "open file" discovery, "counsel in fact obtained all the information to which they were entitled under *Brady*." (JA 213).

After the motion to dismiss was filed, the case sat dormant for over seven months until the Warden moved

for entry of an order dismissing the petition. Only then did Strickler seek the appointment of experts and an investigator. (JA 234). At no time, however, did Strickler seek discovery pursuant to Virginia Supreme Court Rule 4:1(b)(5), which allows discovery in habeas cases "with prior leave of the court." On September 10, 1993, the habeas court dismissed Strickler's petition. (JA 247).

Strickler's subsequent petition for appeal to the Virginia Supreme Court was granted, limited to his Assignment of Error No. 9 and a related ineffective counsel claim.[5] After full briefing and oral argument, the Virginia Supreme Court ruled that the substantive claim regarding the propriety of a jury instruction was barred under *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974), *cert. denied*, 419 U.S. 1108 (1975), because it had not been raised at trial and on direct appeal. Strickler's ineffective counsel claim was rejected because, in light of the overwhelming evidence that Strickler murdered Whitlock during the commission of a robbery while armed with a deadly weapon – the 69-pound rock – Strickler failed to demonstrate that he had been prejudiced by counsel's alleged error. *Strickler v. Murray*, 452 S.E.2d 648 (Va. 1995). This Court denied Strickler's petition for a writ of certiorari on October 2, 1995. *Strickler v. Angelone*, 516 U.S. 850 (1995).

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[5] Assignment of Error 9 read:

> The [state habeas judge] erred in not vacating the capital murder conviction despite its finding that Instruction 1 given at petitioner's trial was defective because of its inclusion in the definition of capital murder an underlying offense which does not by statute support a conviction of capital murder.

E. Federal habeas corpus:

In the United States District Court for the Eastern District of Virginia, Strickler sought and was granted ex parte, pre-petition discovery, whereby he obtained eight documents from the files of the Harrisonburg Police Department pertaining to Anne Stoltzfus. Strickler then filed a lengthy federal habeas petition which for the first time raised a "*Brady*" claim based upon the alleged non-disclosure of the so-called "Stoltzfus materials."

During subsequent discovery conducted by Strickler in the district court, the prosecutor stated unequivocally under oath that exhibits 2, 7 and 8 of the "Stoltzfus materials" were in the "open file" which the defense inspected prior to trial. (JA 368). The prosecutor, however, never had seen exhibits 1, 3, 4, 5 and 6 until after Strickler proffered them in support of his federal habeas petition. (JA 366-367).

All of Strickler's claims, except the exculpatory evidence claim and various allegations of ineffective assistance of counsel, were dismissed by the district court. (JA 283). Although the court acknowledged that Strickler's exculpatory evidence claim was defaulted because it never had been raised in state court, it ruled without elaboration that Strickler had established "cause" for his default because "the Commonwealth repeatedly withheld [the *Brady* material] throughout the petitioner's state habeas proceedings." (JA 287).

The district court ordered an evidentiary hearing, but both parties filed motions for summary judgment, accompanied by supporting documents. In support of his cross-motion for partial summary judgment, the Warden filed an affidavit from one of Strickler's trial counsel, Thomas Roberts. In the affidavit, Roberts stated that the trial defense team was aware at the time of trial of the information contained in the "Stoltzfus materials" and of the

fact that Stoltzfus' recollection of the abduction at the mall allegedly had evolved over time. (JA 371). The Warden also proffered a copy of a Roanoke newspaper article dated June 17, 1990, about which Stoltzfus had been cross-examined at trial. (JA 372). As the district court was forced to acknowledge, the article "contained details [about Stoltzfus' observations] that might have been helpful if Strickler did not already know them." (JA 400).

On October 2, 1997, Strickler withdrew, with prejudice, his ineffective counsel claims and asked the district court to decide the exculpatory evidence claim on the cross-motions for summary judgment. The district court canceled the evidentiary hearing and on October 16, 1997, granted Strickler's motion for summary judgment. Although for purposes of the summary judgment motions the district court specifically credited Roberts' affidavit, it denied the Warden's cross-motion for summary judgment. (JA 399). In its final order granting the writ, the district court concluded that exhibits 1, 3, 4, 5 and 6 of the "Stoltzfus materials" were "material" under *Brady* because "without Stoltzfus' testimony, the jury could have found Henderson as the leader and instigator [of Whitlock's abduction] instead of Strickler." (JA 394). The district court also reached the implausible conclusion that "exhibit 4 provide[d] a basis for which Stoltzfus' testimony might have been excluded altogether." (JA 389). The district court did not mention exhibits 2, 7 or 8, but did not take issue with the prosecutor's sworn, unequivocal representation that the defense had access to each of those documents prior to trial.

The Fourth Circuit unanimously reversed, concluding that, because Strickler's *Brady* claim was available to him in state court through the exercise of reasonable diligence, there was no "cause" for his undisputed default. Noting the Virginia rule of court which allows

discovery in a state habeas proceeding with prior leave of court, the Fourth Circuit concluded that "Strickler could have followed a procedure similar to the one he followed in federal court" and discovered the "Stoltzfus materials" during state collateral proceedings. (JA 421). The Court of Appeals also concluded that the Stoltzfus documents were not "material" in light of Strickler's express concession at trial that he was guilty of abduction and robbery, and in light of the "overwhelming evidence in the record," independent of Stoltzfus' testimony, that "Strickler abducted and robbed Whitlock." (JA 425). The Fourth Circuit also specifically found that "the Stoltzfus materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial," that "Strickler never contested that he abducted and robbed Whitlock," and that "Stoltzfus' testimony was not critical to the Commonwealth's case." (JA 425).

SUMMARY OF THE ARGUMENT

It should be an extremely rare event for a federal habeas court to reach the merits of a constitutional claim that never was raised in state court. Here, it is undisputed that Strickler never raised his so-called *"Brady"* claim in state court and that, having failed to raise the claim in his 1992 state habeas petition, Strickler would be barred under Virginia law from raising the claim in state court now.

Strickler admits that he must show "cause" to excuse his default, but his efforts to explain why he could not have raised his claim ***at trial*** miss the mark. The issue here is whether Strickler can show sufficient "cause" to excuse his failure to raise his claim ***during the state collateral proceedings***. He cannot rely on the errors or omissions of his state habeas counsel because he had no

constitutional right to counsel on state habeas. *See Coleman v. Thompson*, 501 U.S. 722 (1991). Therefore, the only way in which he can show "cause" for his state habeas default is to demonstrate some form of state action – something "external" to him and his lawyers – that prevented him from raising the claim in his state habeas petition. *See McCleskey v. Zant*, 499 U.S. 467 (1991). This he cannot do.

Petitioner's *"Brady"* claim concerns eight police documents – three of which he clearly had access to when his trial lawyers reviewed the prosecutor's "open file" – all relating to pretrial statements made by a prosecution witness, Anne Stoltzfus, who was not present when Strickler and his accomplice robbed and murdered their victim in a remote cornfield, but who was present earlier when they abducted her from a shopping mall. The record is replete with information that would have provided a basis for investigating a *Brady* claim in the state habeas court – not the least of which is the fact that one of Strickler's trial attorneys has stated under oath that at the time of trial he was aware of the substance of the information contained in Stoltzfus' pretrial statements to the police. The undeniable fact, moreover, is that there was nothing to prevent Strickler from pursuing his claim during the state collateral proceedings, just as he later pursued it in the federal habeas proceedings in the district court. The Fourth Circuit correctly concluded that Strickler's failure to ask the state habeas court for discovery of the police files is fatal to his effort to establish "cause" for his default.

Even if Strickler's failure to show "cause" could be overlooked, however, under no circumstances should this Court condone his effort to pervert the truth-enhancing *Brady* rule into a license for state prisoners to play fast and loose with the truth. In arguing the "materiality" of

the police documents that were not disclosed to the defense at the time of trial, Strickler would have this Court believe that, if only he could have impeached Stoltzfus' testimony, there would have been no reliable evidence that he was even at the mall when the victim was abducted or that he had any connection with the victim's automobile or other possessions until some point after the murder occurred. Such assertions, however, not only are contradicted by his trial attorney's concession to the jury that Strickler clearly was guilty of abduction, robbery and first-degree murder, but also are belied by Strickler's express admissions to the trial judge and to the probation officer who prepared a pre-sentence report that he was one of the two men whom Stoltzfus had seen entering the victim's car at the mall and that he was present at the crime scene when the victim subsequently was robbed and murdered.

When the record is viewed in its entirety, including all the evidence of Strickler's guilt that could be introduced at any retrial of his case, it is clear that the Fourth Circuit's decision was correct. Given the overwhelming evidence that Strickler and his accomplice murdered the victim during the commission of an armed robbery and, given the fact that Stoltzfus' trial testimony related only to the abduction at the mall and not to the robbery and murder that occurred at a different time and place, there is no reasonable probability that the outcome of Strickler's trial would have been any different if the five undisclosed police documents had been provided to the defense at the time of trial.

ARGUMENT

I. STRICKLER'S SO-CALLED *BRADY* CLAIM IS DEFAULTED AND THERE IS NO "CAUSE" FOR THE DEFAULT.

A. The Default

It is undisputed that Strickler's *Brady* claim never was raised at trial, on direct appeal or in state habeas corpus. If Strickler were to reapply for habeas corpus review in the Virginia Supreme Court, his claim would be barred, not only by Virginia Code § 8.01-654(B)(2), which prohibits successive petitions, but also by Virginia Code § 8.01-654.1, which requires that habeas corpus petitions in capital cases be filed within 60 days after denial by this Court of a petition for a writ of certiorari on direct appeal. Indeed, Strickler expressly admits on brief that he never raised his claim in state court, that he cannot raise the claim in state court now, and that the claim "is therefore procedurally barred." (Pet. Br. at 41).

It is black letter law that if a claim never was raised in state court and would be barred in state court if raised there now, federal habeas corpus relief is precluded as well. *See Teague v. Lane*, 489 U.S. 288, 298-299 (1989). In *Gray v. Netherland*, 518 U.S. 152 (1996), this Court declined to review the merits of a purported *Brady* claim because the claim never had been presented to the Virginia courts and Virginia Code § 8.01-654(B)(2) "preclude[d] review of the claim in any future state habeas proceeding." *Id.* at 162. Strickler's so-called *Brady* claim is identically defaulted and, absent a demonstration by Strickler of both cause and prejudice, this Court cannot consider it.[6]

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[6] Strickler devotes an inordinate amount of his brief to the argument that he has "cause" sufficient to excuse a purported default of his *Brady* claim at trial. To be clear, the Warden never

B. Cause

In *Wainwright v. Sykes*, 433 U.S. 72, 85 (1977), this Court rejected the proposition that a state prisoner could not default a constitutional claim for purposes of federal habeas review unless he were guilty of a "deliberate bypass" of state court remedies. Instead, the Court fashioned a "cause and prejudice" test which requires the prisoner to explain satisfactorily why his claim had not been presented properly to the state courts. *Id.* at 87-91. Subsequent refinements by this Court, however, restricted "cause" to forms of state action, external to the defense, that prevented the prisoner from raising the claim in the state courts, *see Murray v. Carrier*, 477 U.S. 478, 488 (1986), and placed the burden on the prisoner to conduct a "reasonable and diligent investigation" in pursuit of the claim and to present it in a procedurally proper manner. *McCleskey*, 499 U.S. at 498. And, when a default occurs during state collateral proceedings, the prisoner cannot establish "cause" by pointing to the errors or omissions of his state habeas counsel because there is no constitutional right to counsel in such proceedings. *See Coleman*, 501 U.S. at 752. Under firmly established precedent, then, a state prisoner like Strickler cannot show "cause" for his admitted failure to bring a claim during state collateral proceedings if the defaulted claim was available to him in state court through a "reasonable and diligent investigation." *McCleskey*, 499 U.S. at 498.[7]

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has contended that Strickler's *Brady* claim is defaulted because it was not raised at trial. The Warden's contention always has been that the claim is defaulted because it could have been raised on state habeas corpus through the exercise of due diligence, but was not.

[7] Strickler rightly does not contend that he meets the "miscarriage of justice" exception which permits review of otherwise defaulted claims. Simply put, the evidence of Strickler's involvement in the abduction, robbery and murder of Whitlock was overwhelming and he "cannot demonstrate that the alleged [*Brady*] violation caused the conviction of an innocent person." *McCleskey*, 499 U.S. at 502.

1. Strickler's assertion of "cause" is insufficient.

Strickler's primary assertion of "cause" to excuse his uncontested default during the state collateral proceedings is that an isolated statement by the Warden in his motion to dismiss Strickler's habeas petition somehow thwarted his ability to discover and raise his *Brady* claim in state court. This is pure nonsense. The Warden's statement – "[trial] counsel were voluntarily given full disclosure of everything known to the government [and that] counsel, in fact, obtained all the information to which they were entitled under *Brady*" – was made more than two months ***after*** Strickler had filed a state habeas petition that contained no *Brady* claim, and referred only to Strickler's claim that his trial counsel had been ineffective in failing to file a *"Brady"* motion prior to trial. Obviously, a statement by the respondent long ***after*** Strickler had filed his state habeas petition could not have had any impact on Strickler's failure to raise a *Brady* claim in his petition as he was required to do under state law. *See* Va. Code § 8.01-655 (requiring that state habeas petitions conform to a prescribed form which mandates that all claims for relief be listed in the petition).

Under *McCleskey*, Strickler cannot show "cause" for his default unless the Warden's statement "prevented him from raising the claim" in his state habeas corpus petition. *Id.* at 502. In other words, if Strickler "could have by reasonable means obtained a basis to allege" his present *Brady* claim in state court, the Warden's statement is

irrelevant. *Id.* at 498. Entirely aside from the fact that the Warden's statement was made after, rather than before, Strickler filed his state habeas petition, Strickler clearly had "reasonable means" to pursue his claim in state court.

2. Strickler did not diligently investigate and pursue his claim during state collateral review.

Strickler could have undertaken in state court the identical "reasonable and diligent investigation" he later undertook in federal court when he discovered and raised his purported *Brady* claim.[8] Instead, Strickler undertook no investigation whatsoever during state habeas corpus. *McCleskey* thus forecloses any finding of "cause" to excuse Strickler's admitted procedural default.

In *McCleskey*, the prisoner complained of the admission of his statement to a cellmate, specifically alleging that the cellmate was an agent of the state and that placing that agent in his cell violated his Sixth Amendment right to counsel under *Massiah v. United States*, 377 U.S. 201 (1964). McCleskey raised his *Massiah* claim in his first state habeas petition but omitted it from his first federal petition. He subsequently resurrected the *Massiah*

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[8] Strickler and his amicus inexplicably insist upon arguing at length that ***trial*** counsel had no obligation under *Brady* to diligently search for exculpatory material and they dispute the validity of the rule that, if the alleged exculpatory evidence was available to the defense at trial through the exercise of reasonable diligence, the government has no duty to disclose it. This, however, is the issue upon which Strickler sought, but was ***denied***, certiorari. (See Cert. Ptn. at i). The default in Strickler's case occurred on state habeas, not at trial, and the relevant question is whether Strickler undertook a "reasonable and diligent" investigation during the state collateral proceedings.

claim based upon a 21-page statement that he was provided a month before he filed a successive federal habeas petition. In response to McCleskey's *Massiah* claim, the government asserted that he had abused the writ by failing to include the claim in his first federal petition. The district court, however, excused McCleskey's default based on the unavailability of the 21-page document at the time of his first federal habeas petition and granted the writ. The Eleventh Circuit reversed, concluding that McCleskey had abused the writ.

On certiorari, this Court affirmed and held that an abuse of the writ occurs whenever a prisoner inexcusably neglects to include a claim in his first petition. This Court adopted the familiar "cause" default standard for determining whether such neglect is excusable:

> Cause . . . is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition. ***If what petitioner knows or could discover upon reasonable investigation supports a claim for relief . . . what he does not know is irrelevant.***

McCleskey, 499 U.S. at 498 (emphasis added). This Court then concluded that the unavailability of the 21-page statement at the time of McCleskey's first federal habeas petition did not constitute "cause" because his knowledge of other facts was sufficient to "put [him] on notice" of the *Massiah* claim when the first federal petition was filed. *Id.* at 498-499.

As the Court of Appeals concluded in Strickler's case, *McCleskey* stands for the proposition that "cause" for a default can be established only if the factual basis for a claim was not reasonably available when the default

occurred.[9] (JA 422). Strickler's failure to pursue and raise his *Brady* claim in state court was a direct result of his failure to exercise reasonable diligence during state collateral proceedings. Here, as in *McCleskey*, "the record contains much evidence that [Strickler] knew, or should have known, about the [Stoltzfus materials]" at the time he filed his state habeas petition and Strickler was certainly "on notice" to promptly pursue his *Brady* claim. *McCleskey*, 499 U.S. at 499. It simply is beyond question that Strickler could have "by reasonable means obtained a sufficient basis to allege" his *Brady* claim in state court. *Id.* at 498.

First, as the Fourth Circuit correctly concluded, based upon his own cross-examination of Stoltzfus at trial, "Strickler knew that Stoltzfus was interviewed by Detective Claytor on several occasions and had identified Strickler in a photo line up." (JA 421). Moreover, a claim about trial counsel's alleged inadequate cross-examination of Stoltzfus and their alleged failure to impeach her credibility formed the basis of an ineffective counsel claim in Strickler's state habeas petition. (JA 206).

Strickler additionally was aware of a pre-trial interview Stoltzfus gave to a newspaper in which she reportedly stated that she had identified Donna Tudor from a photo line up as the "blonde girl" with Strickler and Henderson at the mall on January 5. (JA 53). This public

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[9] Although *McCleskey* was an abuse-of-the-writ case, the Court stated that "[t]he doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review" and that "the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ [require] that the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts." *See McCleskey*, 499 U.S. at 490-491.

pretrial statement attributed to Stoltzfus not only conflicted with her later trial testimony that she did not know whom she had identified from the photographs and that she was "less confident" of her identification of the "blonde girl," but also was at odds with Tudor's testimony that she had not been at the mall with Strickler and Henderson on January 5 but had first met them at Dice's Inn sometime after nine o'clock that evening. (JA 101).

Despite Strickler's assertion in his state habeas petition that Stoltzfus should have been cross-examined more effectively at trial, despite his ***actual knowledge*** that Stoltzfus had spoken to Claytor on a number of occasions prior to trial, despite Strickler's ***actual knowledge*** that Stoltzfus' trial testimony differed in some respects from what had been reported in the newspaper, and despite the fact that, a month after the conclusion of trial, Stoltzfus publicly credited Claytor for helping her recognize that she had witnessed an abduction and described her "coherent" testimony at trial as the result of an "incredible effort by police to fit a zillion little puzzle pieces into one big picture" (JA 250), Strickler inexcusably undertook *no* investigation of Stoltzfus in the state habeas court. *See McCleskey*, 499 U.S. at 499 (McCleskey's knowledge of facts brought out at trial "alone" were sufficient to put him on notice to pursue a *Massiah* claim).

As part of his state habeas investigation, Strickler obviously could have interviewed his trial counsel and reviewed their files. Indeed, if Strickler had undertaken these elementary tasks at any time in the nine months between the time state habeas counsel was appointed and the time he filed his state habeas petition, he would have discovered that one of his two trial attorneys, Thomas Roberts, was aware of the substance of the information contained in the "Stoltzfus materials" and was aware that Stoltzfus' testimony appeared to have "become much

more detailed over time." (JA 371). Strickler also would have discovered that, despite Stoltzfus' trial testimony that she had spoken to Detective Claytor a number of times prior to trial, trial counsel's file contained none of Stoltzfus' statements to Claytor. (JA 300). Thus, it is clear that Strickler not only could have marshaled sufficient facts to construct a *Brady* claim in state court through the exercise of ***reasonable*** diligence, he could have done so with even ***minimal*** diligence.

As the Fourth Circuit found, moreover, Strickler could have pursued and discovered his *Brady* claim on state habeas just as he later did on federal habeas: by filing a discovery motion. (JA 421). In other words, Strickler could have asked the state habeas court to order the same production of the Harrisonburg police files concerning Stoltzfus' statements to Detective Claytor that the district court later ordered at Strickler's request.

Strickler's purported excuse for not seeking discovery in the state habeas court – that under Virginia law he was not ***entitled*** to discovery in state collateral proceedings as a matter of due course – must be rejected. The Court of Appeals saw through Strickler's obvious ploy to blame the Commonwealth for his indisputable lack of diligence: " . . . in state court, Strickler could have followed a procedure similar to the one he followed in federal court: Strickler could have filed a discovery motion seeking to review the Harrisonburg police files." (JA 421). Indeed, the factual landscape at the time Strickler filed his federal habeas petition was virtually identical to the factual landscape existing at the time Strickler filed his state habeas petition. The only difference, of course, is that when Strickler filed his federal petition, as opposed to when he filed his state petition, the Warden had made the statement in his state habeas pleadings that Strickler says should constitute "cause" for

his default. ***If the statement did not deter Strickler from raising his Brady claim in his federal petition, it could not possibly have prevented him from raising it in his state petition.***

To be sure, Strickler was not "entitled" to discovery on state habeas. *See* Va. S.Ct. Rule 4:1(b)(5) (no habeas discovery "without prior leave of the court"). But neither was Strickler entitled to discovery on federal habeas corpus. *See* Rule 6(a), Rules Governing § 2254 Cases. That simple fact, however, did not prevent Strickler from raising his *Brady* claim o: filing a discovery motion in the district court.

Strickler, moreover, reveals a fundamental misunderstanding of Virginia law when he argues that a discovery motion in the state habeas court would have been unsuccessful because Virginia Supreme Court Rule 3A:11 rendered the police files "privileged and non-discoverable" and because, according to Strickler, the Virginia Supreme Court on direct review invoked Rule 3A:11 and "treated [his] other claims as though he had . . . made . . . a discovery motion." (Pet. Br. at 44). The fact of the matter is that on direct appeal the Virginia Supreme Court never purported to rule on any *Brady* claim or on the propriety of any discovery motion. It merely determined that Strickler's motion for a bill of particulars was properly denied by the trial court because Strickler had received all the discovery to which he was entitled under Rule 3A:11. *Strickler*, 404 S.E.2d at 233. Rule 3A:11, moreover, is totally irrelevant to Strickler's defaulted *Brady* claim: the default occurred on state habeas and Rule 4:1(b)(5), not Rule 3A:11, governs state habeas discovery.[10]

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[10] Rule 3A:11 governs discovery at the criminal trial and does not purport to govern "exculpatory" evidence under *Brady*. The rule merely delineates certain material that a

It is disingenuous for Strickler to suggest that comity and federalism would be "ill-served" by requiring criminal defendants to flood state courts with "speculative discovery requests" to preserve federal rights for later review. (Pet. Br. at 45). No judicial system should be deluged with ***speculative*** discovery requests, and such requests would be denied by any system of discovery that requires a showing of good cause. Because Strickler's federal discovery request was made and granted ex parte, the Warden is not in a position to comment on the "good cause" showing Strickler may or may not have made in support of his request. The undeniable fact remains, however, that whatever Strickler asserted as "good cause" on federal habeas could have been asserted on state habeas.

The real thrust of Strickler's argument is that he should be excused from seeking discovery in the state habeas court because he perceived that the request would be denied. Perceived futility, however, is no more "cause" for a prisoner's failure to properly develop and present ***facts*** to the state courts, *see Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-12 (1992) (applying "cause and prejudice" standard to defaulted facts), than it is for a prisoner's failure to present a constitutional ***claim*** to the state courts. *See Engle v. Issac*, 456 U.S. 107, 130 (1982) ("If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim."). In any event, Strickler's perception is faulty as well as irrelevant. Although state habeas discovery requests must be decided, as they are in federal court, on a case-by-case basis, Virginia courts on a number of occasions have granted discovery of police files in capital

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defendant is entitled to even if such material is entirely ***inculpatory***.

habeas cases.[11] (See discovery orders and related materials in *Soering v. Warden, Fisher v. Murray,* and *Payne v. Thompson*; copies lodged with the Clerk's Office).

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[11] The amicus brief filed on behalf of the petitioner is based on the false premise that the Fourth Circuit concluded "that Strickler would have been entitled in state court to subpoena the police file." (Pet. Amicus Br. at 6). The Court of Appeals reached no such conclusion. Strickler was no more "entitled" to discovery during the state habeas proceedings than he was during the federal habeas proceedings. What the Fourth Circuit concluded was, not that Strickler would have been entitled to state habeas discovery, but that he could have asked the state court for such discovery pursuant to Rule 4:1(b)(5), just as he later asked the district court for discovery pursuant to Rule 6(a). (JA 421). Strickler's amicus brief also is wrong when it asserts that the Court of Appeals fashioned its ruling "from whole cloth" and that the Warden never asserted that Strickler could not show "cause" for his default because he could have asked the state habeas court for discovery. (See Warden's CA4 Br. at 12: asserting that Strickler could not establish cause because he "never sought to review police files nor did he ever ask the state habeas courts for discovery"). Finally, the amicus brief's litany of cases in which Virginia courts have denied discovery in capital habeas cases is meaningless. Conspicuously absent from the amicus' submission are the conclusory, pro forma discovery motions which were filed in those proceedings and which could not have justified a legitimate finding of "good cause" for discovery in either state or federal court. And, despite the amicus' suggestion that police files never can be the subject of discovery in state habeas proceedings, the undeniable fact is that Virginia courts have ordered such discovery when the petitioner has made the requisite showing of good cause. (See lodged material cited in text).

3. The Warden's isolated statement in a pleading filed after Strickler filed his state habeas petition cannot excuse Strickler's failure to raise his *Brady* claim in state court.

Notwithstanding his failure to conduct a reasonable and diligent investigation in the state court, Strickler nevertheless seeks to hold the Commonwealth responsible for his failure to raise the *Brady* claim in his state habeas petition. His strategy is to allege that the Commonwealth engaged in misconduct when the Warden stated in his response to Strickler's state habeas petition that "[trial] counsel were voluntarily given full disclosure of everything known to the government [and that] counsel, in fact, obtained all the information to which they were entitled under *Brady*." (JA 212-213). Just as the assertion of bad faith on the part of the State in *McCleskey* did not "detain [this Court] long," *McCleskey*, 499 U.S. at 501, neither should Strickler's equally misleading assertion. Simply put, "the issue [of bad faith] is not presented in this case despite all [of Strickler's] emphasis on it." *Id.*

The Warden's statement obviously was not an assertion that he had reviewed the Commonwealth's files for possible exculpatory material. The Warden, who was a defendant in a civil lawsuit brought by Strickler, was merely answering Strickler's claim that his trial counsel had been ineffective in failing to file a general motion requesting the disclosure of "*Brady*" material.[12] The Warden's statement simply represented his position that,

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[12] Although it is not an issue in this case because Strickler has not raised it in either his certiorari petition or opening brief, a criminal defendant's ***trial*** right to the disclosure of exculpatory evidence does not extend to the realm of state collateral proceedings where the prisoner is the plaintiff and his custodian is the defendant. This Court repeatedly has refused to extend trial rights, that were established as a shield to protect a

based upon what Strickler's trial counsel knew at the time of trial, they were not ineffective in electing not to file a formal *Brady* motion.[13] In any event, Strickler's later investigation and pursuit of the claim in federal court establishes beyond question that he did not regard the Warden's statement as a guarantee that the Commonwealth possessed no exculpatory evidence not disclosed at trial. Simply put, it would be unreasonable for this Court to conclude that what obviously did not deter Strickler in federal court somehow "prevented" him from raising his claim in state court and "caused" him to default his claim.

Even if, however, the Warden's statement could be divorced from the context in which it was made and even if it could be construed as an affirmative representation that there was no exculpatory evidence left to be discovered – and it certainly cannot – the timing of the statement still would preclude the statement from serving as "cause" for Strickler's failure to include the *Brady* claim in his state habeas petition. The Warden's statement was contained in a motion to dismiss Strickler's state habeas petition filed on November 12, 1992 – eleven months after habeas counsel had been appointed to represent Strickler *and two-and-one-half months after Strickler filed his state*

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defendant against the State in the context of a criminal prosecution, to post-trial civil proceedings where the prisoner is attacking a presumptively valid state court criminal judgment. *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 7-10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

[13] Indeed, it is noteworthy that in the court below Strickler acknowledged that he did not perceive the Warden's statement as an unequivocal assertion that the Warden had examined the Commonwealth's files for exculpatory evidence. (See Strickler's CA4 brief at 27 n.9: "***If*** counsel for the Warden in fact examined the prosecutor's files before making this representation . . . "; emphasis added).

habeas petition which contained no claim of *Brady* error. (JA 204-212). In short, nothing the Warden said in November of 1992 could have prevented Strickler from raising a *Brady* claim in the habeas petition he already had filed in September of that year.

Strickler cites *Amadeo v. Zant*, 486 U.S. 214 (1988), as support for his proposition that the Warden's statement is "cause" for his default. In *Amadeo*, this Court stated that government concealment of evidence could be "cause" for a procedural default if the concealment "***was the reason*** for the failure of a petitioner's lawyers to raise the [claim] in the trial court." *Id.* at 222 (emphasis added). Such clearly is not the situation in Strickler's case.

Amadeo defaulted his equal protection challenge to his grand jury and trial jury but did so only because he could not have discovered that at the time of trial the State was intentionally discriminating by race in the selection of all prospective jurors. *Id.* at 216-217. When Amadeo learned after trial, by a "mere fortuity," of a hidden memorandum detailing the State's intentional underrepresentation of black persons on its jury lists, he asserted an equal protection challenge on direct appeal but the state court ruled that the challenge came too late. *Id.* at 218. After the Eleventh Circuit reversed a grant of federal habeas relief, this Court granted certiorari and reversed the judgment of the Court of Appeals, concluding that the district court correctly found that Amadeo had "cause" for his default: the hidden memorandum was not reasonably discoverable at the time of trial because it deliberately had been concealed by the government. *Id.* at 224-229.

Strickler's case, however, is nothing like *Amadeo*. No evidence was "concealed" from Strickler during the state habeas proceedings where the default occurred. Strickler was free to include any *Brady* claim he wished in his state habeas petition but he failed to do so, even though he alleged elsewhere in his petition that his trial counsel

were ineffective in failing to pursue *Brady* material. And, most importantly, Strickler failed to ask the state habeas court for the same discovery he later sought and obtained in federal court. The indisputable fact is that, when Strickler finally chose to file a discovery motion seeking access to the police files, such discovery was granted and the "Stoltzfus materials" were turned over to Strickler. *See McCleskey*, 499 U.S. at 501 (noting that McCleskey had mischaracterized government conduct as wrongful because, in part, the police "turned over the 21-page document upon request."). There is no reason to believe that the result would have been any different if Strickler had filed his discovery request in state court rather than federal court. As the Fourth Circuit concluded, if Strickler had asked the state habeas court for discovery, "it is likely the state court would have ordered the production of the [police] files." (JA 421).

Unlike the petitioner in *Amadeo*, Strickler clearly was "on notice" of a possible *Brady* claim. Indeed, as this Court noted when it rejected McCleskey's similar attempt to liken his case to *Amadeo*: "even if the State intentionally concealed the [evidence in question] the concealment would not establish cause here because, in light of [petitioner's actual and constructive knowledge of the possible *Brady* claim,] any . . . concealment would not have prevented him from raising the claim in [state court]." *See McCleskey*, 499 U.S. at 502.

Numerous times this Court has said that, consistent with the principles of federalism and comity, the States hold the initial responsibility for vindicating a state prisoner's federal constitutional rights. *See, e.g., Coleman*, 501 U.S. at 748; *Engle*, 456 U.S. at 128; *McCleskey*, 499 U.S. at 491. By unreasonably failing to pursue and raise his *Brady* claim in state court, Strickler deprived Virginia of any opportunity to adjudicate his claim and thereby encouraged "federal intrusion" into the state criminal process. *Engle*, 456 U.S. at 129. This Court should refuse to reward

such disrespect for the state judicial system, especially where, as here, the prisoner's default is undisputed, his assertion of "cause" is patently inadequate and his guilt is clear-cut.

II. EVEN IF STRICKLER COULD SHOW "CAUSE" FOR HIS DEFAULT, HE CANNOT SHOW "PREJUDICE" BECAUSE HIS *"BRADY"* CLAIM HAS NO MERIT.

A. Strickler must establish both "cause" and "prejudice" before his default may be excused.

Even if it were assumed that Strickler somehow could establish sufficient "cause" to excuse his default, he also would have to establish "actual prejudice" before the merits of his barred *"Brady"* claim could be considered. To establish "actual prejudice," it is Strickler's burden to establish "not merely that the errors at his trial created a possibility of prejudice, but that the errors worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension." *United States v. Frady*, 456 U.S. 152, 170 (1982). The district court failed to apply or even acknowledge the *Frady* prejudice test. The Fourth Circuit, however, correctly applied *Frady* and held that, because the "Stoltzfus materials" did not meet the materiality test set forth in *United States v. Bagley*, 473 U.S. 667 (1985), Strickler had not established "actual prejudice." (JA 424). The Court of Appeals thus properly declined to excuse Strickler's uncontested default.

B. Strickler cannot satisfy the *Brady/Bagley* standard.

The prosecution has an affirmative duty to disclose evidence, including impeachment evidence, favorable to an accused where the evidence is material either to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963); *Bagley*, 473 U.S. at 674; *Kyles v. Whitley*, 514 U.S. 419

(1995). Evidence is "material," however, only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 687; *Kyles*, 514 U.S. at 433. A reasonable probability of a different result does not exist unless the previously undisclosed evidence "undermines confidence in the outcome of trial." *Bagley*, 473 U.S. at 678; *Kyles*, 514 U.S. at 434.

In other words, to establish *Brady* "prejudice," Strickler must show that the "Stoltzfus materials" create a reasonable probability that the outcome of his trial would have been different if the documents had been disclosed to the defense at the time of trial. *Bagley*, 473 U.S. at 677. There can be no *Brady* violation, however, if the information contained in the allegedly withheld documents was actually known to the defense. *See United States v. Agurs*, 427 U.S. 97, 103 (1976) ("The rule of *Brady* . . . arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but ***unknown to the defense.***") (emphasis added). Keeping these principles in mind, it is clear that the Fourth Circuit was correct when it determined that Strickler had failed to establish the required prejudice. The substance of the allegedly withheld evidence was known to the defense, the evidence was not exculpatory and, even if it was marginally exculpatory, it was not material.

1. Strickler's admissions that he was at the mall, in the victim's car with the victim and at the murder scene preclude a finding of materiality.

At allocution and in the pre-sentence report, Strickler admitted that he was at the Valley Mall on January 5, 1990, that he got into the victim's car with the victim and

that he was present at the murder scene during Whitlock's murder. Given these express admissions by Strickler, Strickler cannot possibly demonstrate that there is a reasonable probability that the result of his trial would have been different had the "Stoltzfus materials" been disclosed at the time of trial. In light of Strickler's admissions at trial, it is nothing short of outrageous that he asserts on brief that, without Stoltzfus' testimony, there was no proof that he was even at the mall when Whitlock was abducted or that he had any contact with Whitlock's vehicle until sometime after she was murdered. (Pet. Br. at 18, 33). Strickler may attempt to argue that his admissions at allocution and in the pre-sentence report are of no significance because they occurred after the jury had rendered its verdicts. In *Wood v. Bartholomew*, 516 U.S. 1 (1995), however, this Court, in determining "materiality" under *Bagley*, considered the allegedly exculpatory evidence as well as evidence that "the state could likely introduce on retrial." *Id.* at 8.[14]

The *Bartholomew* approach comports with the purpose of *Brady*. The "overriding concern" of *Brady* and its progeny is, after all, "with the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. It would be a perversion of justice to grant Strickler relief on a *Brady* claim related to Stoltzfus' trial testimony when that testimony served only to identify Strickler as one of the men who abducted Whitlock at the mall and it is beyond question that the evidence the prosecution could introduce at any retrial – Strickler's own admissions – would establish that fact beyond any conceivable doubt.

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[14] The *Brady* claim in *Bartholomew* was a guilt-stage claim and the State clearly would have been able to introduce at the guilt stage of any retrial evidence of the prisoner's confession to a cellmate which had been introduced only at the penalty stage of the original trial. *Id.*

Even if Strickler were permitted to disavow his post-verdict admissions, however, he expressly conceded in his guilt-stage closing argument that he had abducted and robbed Whitlock. (JA 192). Strickler then used his strategic concession to argue to the jury that the Commonwealth had not proven that he was guilty of capital murder. According to Strickler, the prosecution had not established that he, rather than Henderson, had killed Whitlock, because the physical evidence which the Commonwealth argued linked him to the murder in the cornfield – mainly the hair strands that forcibly had been pulled from his head – just as easily could have been deposited on Whitlock's blouse during the struggle that Strickler admitted had occurred *when he had abducted Whitlock at the mall.* (JA 192). Strickler's express, unequivocal admissions before the jury preclude any finding of materiality.[15]

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[15] Strickler asserts that the value of the undisclosed evidence should be assessed based upon its abstract potential impact and not upon the significance it would have had to the case as it actually was tried. (Pet. Br. at 37). This approach, however, specifically has been rejected by this Court. *See Agurs*, 427 U.S. at 112 n. 20 (rejecting argument that *Brady* standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial). Even assuming that Strickler's trial strategy somehow may have been different had the documents been disclosed, in the absence of a strategic concession to the abduction, Strickler's theory at trial would have had to have been either that he never was at the mall on January 5, 1990, or that he was at the mall but did not abduct Whitlock. The "desperate implausibility" of either of these theories is apparent. *See Kyles*, 514 U.S. at 461 (Scalia, J., dissenting) (" . . . the desperate implausibility of the theory that petitioner put before the jury must be kept firmly in mind."). If Strickler had asserted that he never was at the mall on January 5, the assertion would have been contradicted by the compelling testimony of two disinterested witnesses, Virginia Smith and

2. The defense knew the substance of the alleged exculpatory information at the time of trial.

The uncontradicted affidavit of one of Strickler's two trial attorneys, Thomas Roberts, conclusively establishes that Strickler was aware at the time of trial of the facts contained in the "Stoltzfus materials."[16] Although Roberts could not recall specifically whether he actually had seen the "Stoltzfus materials," he was certain that he was aware at the time of trial that Stoltzfus' account of what she had observed at the mall "had become much more detailed over time." (JA 371). Because at least one of Strickler's trial attorneys unquestionably knew the essential facts which would have permitted Strickler to take advantage of the alleged "exculpatory evidence," there is

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Donna Warner – both of whom, along with Stoltzfus, unequivocally placed him at the mall that afternoon. Alternatively, Strickler would have been left with the implausible assertion that, although he was at the mall when Whitlock was abducted, he had nothing to do with her abduction and only through sheer coincidence came into possession of her car and was seen driving it into the field where she was murdered less than an hour later.

[16] The Court of Appeals did not discuss Roberts' affidavit. The district court, however, accepted Roberts' affidavit "as true" for purposes of deciding Strickler's motion for summary judgment. (JA 399). In his affidavit, Roberts stated:

> I have reviewed the [Stoltzfus materials] and although I cannot recall if I have seen these specific documents, ***I do remember the information contained in them. I remember discussing with [co-counsel] Mr. Bobbitt the possibility that Ms. Stoltzfus may not be a credible witness because she had not come forward immediately and her story had become much more detailed over time.*** It seemed too good to be true.

(JA 371, emphasis added).

no *Brady* violation. *See Agurs*, 427 U.S. at 103 (exculpatory information must be "unknown to the defense").

There also is no *Brady* violation in Strickler's case because, as Strickler himself established through discovery in the district court, three of the eight items proffered on federal habeas (exhibits 2, 7 and 8; JA 307-311, 319-327) were in the Commonwealth's Attorney's file prior to trial and thus were available and known to Strickler pursuant to the Commonwealth's undisputed open file policy.[17] (JA 368). A detailed review of the eight documents establishes that the five documents Strickler

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[17] In the district court, Strickler submitted interrogatories to the Commonwealth's Attorney and he also obtained affidavits from William Bobbitt, one of his trial attorneys, and from Humes Franklin, Ronald Henderson's trial lawyer. The prosecutor's assertions under oath were clear and unequivocal that documents 2, 7 and 8 were in his file when Strickler's attorneys reviewed the file prior to trial. Bobbitt, on the other hand, merely said that he did not recall seeing exhibits 1-7 of the "Stoltzfus materials" when he reviewed the Commonwealth's file prior to trial and that a post-trial review of his trial files did not locate any of the documents. That, of course, is a far cry from stating unequivocally that the documents were not in the Commonwealth's file when he reviewed it. And although Bobbitt was presented with copies of all eight exhibits when he executed his affidavit, noticeably absent from his affidavit is any assertion that he never had seen exhibit 8 of the "Stoltzfus materials." (JA 300: "I have reviewed the attached Exhibits 1-7 . . . I have no recollection of seeing any of this material in the Commonwealth's files. . . . "). In any event, a prosecutor has no duty to insure that a defense attorney actually notices a particular document or perceives its significance when he reviews the prosecutor's file. The fact that Strickler's trial attorneys may not have made copies of documents 2, 7 or 8, or used the information at trial is entirely consistent with the Fourth Circuit's conclusion that the information simply was not of any substantial value to the defense. In other words, the documents were not "material."

allegedly was not provided (Exhibits 1, 3, 4, 5 and 6; JA 306-307, 311-318) contain no information substantially different from what is contained in the three disclosed documents.[18]

Strickler contends that exhibit 1, handwritten police notes, is exculpatory because it establishes that Stoltzfus initially could not identify Leanne Whitlock as the girl abducted by Strickler. (JA 306). Exhibit 7, however, which Strickler had access to through the Commonwealth's open file policy, establishes the very same thing. It is clear from exhibit 7 that Stoltzfus identified Whitlock days after the crime and only *after* she and Whitlock's boyfriend, John Dean, viewed pictures of Whitlock in each other's presence. (JA 318).[19]

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[18] Exhibits 1, 3, and portions of exhibit 2, moreover, bear the same date and establish that in Stoltzfus' initial January 19, 1990 visit with the police she provided a description of Strickler, Henderson and the blonde girl, and identified Strickler and Henderson from a photo array. Stoltzfus also told the police at that time that she could not identify the black female victim. Finally, in that initial interview, Stoltzfus recounted Whitlock's abduction – including the fact that Whitlock was driving a blue car with West Virginia tags and that Strickler approached Whitlock's vehicle, pounded on the window and then jumped into the car and began hitting Whitlock. (JA 306-307, 311-312). Strickler's assertion that any "variations" between these documents render them "exculpatory" cannot withstand scrutiny. A witness' statements to the police on a particular date cannot be deemed "exculpatory" merely because various parts of the same interview were recorded in separate documents.

[19] This same information also was known to Strickler through the Roanoke newspaper article, a copy of which Strickler unquestionably possessed at the time of trial. (JA 372-381). In that article, Stoltzfus mentioned that she viewed pictures of Whitlock with John Dean to verify that Whitlock was the woman she had seen abducted. (JA 377). Whitlock's identity was never an issue at trial, however, and any attempt to "impeach" Stoltzfus by suggesting that the black woman in the blue car was not Whitlock would have been ludicrous.

Similarly, exhibit 3, a handwritten document entitled "Observations," does not contain any information not fully disclosed in exhibits 2, 7 and 8. In exhibit 3, for example, Stoltzfus described the car Whitlock was driving as a "dark blue new sports car" with "West Virginia tags." Identical information is contained in exhibits 2 and 8, which Strickler had seen prior to trial. (JA 310-311, 323). In exhibit 3, Stoltzfus described Strickler as being "West Virginia looking" and a "scroungy bum type" with "long blonde scraggly hair." Stoltzfus' description is repeated, practically verbatim, in exhibits 2 and 8 which Strickler had seen prior to trial. (JA 308, 324).

In exhibit 3, Stoltzfus gave the following account of Whitlock's abduction: Strickler approached Whitlock's car, pounded on the car window, entered the car and began hitting Whitlock while Whitlock sounded the car horn. The blonde girl with Strickler then attempted to enter the car by putting one foot in the back seat but the car lurched forward. Finally the female and Henderson got into the back seat of the car. This narrative, however, also is fully contained in exhibits 2 and 8, which were in the prosecutor's file which Strickler reviewed prior to trial. (JA 307-311, 322-327).

Exhibit 4 is a letter from Anne Stoltzfus to Detective Claytor. In this letter, Stoltzfus constructed a time line of her January 5 journey through the Valley Mall and noted that she initially encountered Strickler and Henderson at a music store. All this information is contained in exhibit 8. (JA 322-323). Also in exhibit 4 Stoltzfus admitted that she did not initially recall being at the mall on January 5, 1990 or thought that perhaps she had been there later in the evening. Stoltzfus, however, confirmed her presence at the mall on January 5 and at the time of Whitlock's

abduction with several cash register receipts and a canceled check. (JA 313-314).[20]

Finally, it is clear that the information contained in exhibits 5 and 6 also was disclosed to Strickler prior to trial. Exhibit 5 is titled "My Impressions of the Car." In it, Stoltzfus accurately described John Dean's vehicle, including the fact that the car had West Virginia license plates. Information about the car and its West Virginia tags had been reported to the police in Stoltzfus' initial police interview and was made available to Strickler in exhibit 2 which was contained in the prosecutor's open file. Exhibit 6, on the other hand, is a short letter wherein Stoltzfus acknowledged that, after reviewing pictures of Whitlock with John Dean, she positively identified Whitlock as the black female she saw abducted at the mall. (JA 318). This information, however, had been fully disclosed to Strickler in exhibit 7 and through the Roanoke Times article which the Strickler defense team had in its possession prior to trial.

Strickler, then, unquestionably possessed – through one of his trial attorney's actual knowledge and through the prosecutor's open file disclosure of exhibits 2, 7 and 8 – the substance of all the relevant information contained in the allegedly withheld documents. That being the case,

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[20] The district court's conclusion that references in exhibit 4 to Stoltzfus' daughter and to the daughter's recollections may have constituted a basis for ***barring*** Stoltzfus' testimony altogether is frivolous. In this regard, Strickler's reliance upon *Manson v. Brathwaite*, 432 U.S. 98 (1977), is misplaced. *Brathwaite* held that due process did not compel exclusion of pretrial identification evidence obtained by a suggestive photo identification if, under the totality of the circumstances, the identification was reliable. There was nothing even remotely suggestive about Stoltzfus' pretrial identification of Strickler, who never has challenged the admissibility of that identification.

Strickler cannot possibly show "actual prejudice" as the result of an alleged *Brady* error.[21]

3. The "Stoltzfus materials" are inculpatory, not exculpatory.

Even a cursory examination of the allegedly suppressed documents, moreover, establishes that each of them, on its face, is wholly inculpatory. Indeed, Strickler does not claim otherwise. Instead, his argument is founded entirely upon his assertion that claimed "inconsistencies" between each of these statements rendered them exculpatory.[22] For a number of reasons, whatever minor variations existed among Stoltzfus' various accounts hardly required their production.

First, the prosecution clearly has no duty under *Brady* to make a detailed accounting of its investigation. *Agurs*, 427 U.S. at 109; *Moore v. Illinois*, 408 U.S. 786, 795 (1972). Strickler's assertion that he constitutionally was entitled to pretrial disclosure of each of Stoltzfus' ***inculpatory***

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[21] In his discussion of the exhibits, Strickler attempts to mislead this Court by asserting that exhibit 1 establishes that Stoltzfus initially could not identify Strickler. While the exhibit contains no description of the "1st W/M," it nowhere indicates that Stoltzfus could not identify that person. (JA 306). The fact of the matter is that Stoltzfus ***did*** identify Strickler in her initial encounter with the police. (JA 310). Strickler also asserts that exhibit 8 was one of the last two documents prepared by Stoltzfus. (Pet. Br. at 38 n.15). Exhibit 8, however, is ***undated*** and the record does not disclose when it was prepared. (JA 322).

[22] To be clear, there are no per se "inconsistencies" among the various documents. Stoltzfus, for example, never alternatively described Strickler as blonde-haired then red-headed, or first as husky then as slim. There are, however, minor variations among the documents in that each document does not contain a full recitation of everything that Stoltzfus observed at the mall when the victim was abducted.

statements not only is contrary to Virginia law, *see* Rule 3A:11(b)(2), Rules of the Supreme Court of Virginia (prohibiting discovery by a criminal defendant of statements made by prosecution witnesses) but should be recognized for what it really is: an attempt to expand *Brady* to require exactly what *Agurs* says is not required – full disclosure of the results of a police investigation. Under clearly established law, prosecutors are "under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses." *Agurs*, 427 U.S. at 109.[23]

It is, moreover, completely unremarkable that a citizen witness such as Stoltzfus initially expressed some hesitancy and uncertainty when speaking with the police about this undoubtedly important police investigation. Such witnesses naturally want to be sure that what they tell police is accurate and cannot reasonably be expected to say exactly the same thing on each occasion that they discuss their observations with the police. Requiring disclosure of any and all such uncertainties is neither reasonable nor realistic.[24]

Finally, the alleged discrepancies among Stoltzfus' various statements do not give rise to any inference that Stoltzfus' testimony was unreliable, untruthful or that Strickler was not one of the two men directly involved in

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[23] Indeed, this Court could not grant Strickler's implicit request to expand the scope of *Brady* without violating the "new rule" doctrine. *See generally Graham v. Collins*, 506 U.S. 461, 467 (1993) ("A holding constitutes a 'new rule' . . . if it . . . 'imposes a new obligation on the States.' ").

[24] *See, e.g., United States v. Comonsona*, 848 F.2d 1110, 1115 (10th Cir. 1988) ("If a statement does not contain any expressly exculpatory material, the Government need not produce that statement to the defense"); *United States v. Phillip*, 948 F.2d 241 (6th Cir. 1991) (no *Brady* violation because suppressed statements, "taken as a whole, are heavily inculpatory"), *cert. denied*, 504 U.S. 930 (1992).

Whitlock's abduction, robbery and murder. First of all, Strickler has admitted he was at the mall and with Whitlock. The allegedly suppressed documents and Stoltzfus' trial testimony are, moreover, entirely consistent with other independent evidence which conclusively established that Strickler was at the Valley Mall at the same time Whitlock was supposed to return John Dean's car to him at the mall. For instance, the mall security guard saw Strickler in the mall food court at around 6:45 p.m., wearing jeans and a jean jacket. Strickler left the food court and headed toward the front entrance of the mall near J. C. Penney and Watsons. (JA 31-32). Whitlock, on the other hand, was last seen by her roommates around 6:30 p.m. when she left the apartment they shared to go to the mall to return Dean's blue car with West Virginia plates. (JA 22). Consistent with all of this testimony, and consistent with the allegedly withheld documents, Stoltzfus testified that, after she had left a mall music store at approximately 6:45 p.m. and returned to her car, she saw Strickler, who was wearing jeans and a denim jacket, in the mall parking lot near J. C. Penney, Watsons and the front entrance of the mall. Strickler then accosted Whitlock who was driving a blue car with West Virginia tags. (JA 92, 94, 99).[25]

Strickler's purported "inconsistencies," moreover, deal only with trivial matters ***which were not contested at trial***. For example, Strickler never contested that it was Whitlock who was abducted at the Valley Mall. It is hardly "exculpatory" then that Stoltzfus initially told police she thought she would be unable to identify the female she saw abducted. Likewise, there was never any

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[25] Stoltzfus also testified that, while in the mall, Strickler had been accompanied by a woman he called "Donna." Donna Lynn Warner testified that while shopping at the Valley Mall on January 5, she encountered Henderson and Strickler and had spent part of the afternoon with them. (JA 27-28).

dispute about whether Whitlock was driving Dean's dark blue car with West Virginia tags when she was abducted. Given that Strickler did not contest that fact at trial, Stoltzfus' pretrial description of the car contained in exhibit 5 likewise cannot be considered in any sense "exculpatory."

Given Strickler's express admissions at trial, and the insignificant and collateral nature of the variations between Stoltzfus' several pretrial statements, the "Stoltzfus materials" in no way can be considered "exculpatory."[26] *Bagley*, 473 U.S. at 676 n. 7 (a prosecutor does not commit error by failing to disclose "insignificant" evidence to the accused).

4. The Fourth Circuit correctly ruled that the information was not "material."

Even assuming that the "Stoltzfus materials" were in some technical sense "exculpatory," under no circumstances would the attempted impeachment of Stoltzfus with the allegedly non-disclosed statements have created a "reasonable likelihood that the result of Strickler's trial would have been different." *Bagley*, 473 U.S. at 687; *Kyles*, 514 U.S. at 433. As the Fourth Circuit correctly recognized, "Stoltzfus' testimony ***was not*** critical to the Commonwealth's case . . . the Stoltzfus materials would have provided little or no help to Strickler in either the guilt or sentencing phases of trial." (JA 425). Stoltzfus was cross-examined thoroughly by Strickler about the only plausible subject upon which she could be impeached – t[illegible] fact

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[26] Strickler's assertion that exhibit 2 is somehow "exculpatory" because it contains a notation that, after Stoltzfus had identified Strickler from a photo lineup, she advised the police "that she might be able to identify [Strickler] positively if seen in person" must also be rejected. (JA 310). The fact of the matter is that exhibit 2 establishes only the ***inculpatory*** fact that Stoltzfus identified Strickler prior to trial.

that, after she had witnessed such an obviously distressing abduction, she did not report it to the police. (JA 50-53).

Strickler, moreover, was convicted of capital murder in the commission of robbery while armed with a deadly weapon, as well as capital murder during the commission of abduction with the intent to extort money or a pecuniary benefit, or with the intent to defile.[27] *Strickler*, 452 S.E.2d at 650-651. As the Fourth Circuit recognized, even without Stoltzfus' testimony, there was overwhelming evidence that Strickler abducted and robbed Whitlock, and Stoltzfus' testimony was not even marginally relevant to the robbery. (JA 425). Strickler, in fact, acknowledges on brief that his *Brady* claim would have no merit and his capital murder conviction would remain valid if his conviction is "supported [with] compelling evidence of armed robbery." (Pet. Br. at 35). The record here is replete with such compelling evidence and, in any event, clearly will not support a conclusion that there is "a reasonable probability of a different result."

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[27] At the time of Strickler's offense, abduction of a person over the age of twelve with intent to defile was not a predicate offense to capital murder in Virginia. *Strickler*, 452 S.E.2d at 651. On state habeas corpus, Strickler for the first time challenged the jury instruction which permitted the jury to find him guilty of such an offense. The Virginia Supreme Court ruled that Strickler's direct challenge to the instruction was defaulted because it could have been raised at trial and on direct appeal. *Id.* Strickler's assertion that he was denied effective assistance of counsel at trial because his attorney failed to object to the "intent to defile" language in the instruction was rejected in light of the "overwhelming evidence that Strickler committed the willful, deliberate and premeditated killing of Leanne Whitlock in the commission of robbery while armed with a deadly weapon." *Id.* at 652. Strickler's ineffective counsel claim no longer is at issue.

The undisputed independent evidence established that at about 4:30 p.m. on January 5, 1990, Whitlock borrowed John Dean's 1986 blue Mercury Lynx automobile and agreed to return the car to Dean "an hour or two later" at the Valley Mall. At approximately 6:00 p.m., Whitlock ate a fast-food dinner and then left to return the borrowed car to Dean at the mall around 6:30 p.m. (JA 22). When Whitlock left to return the car, she was wearing a pair of pearl earrings that belonged to her mother. (JA 23). Whitlock, however, never returned the car and the undisputed evidence established that on the day of Whitlock's disappearance, Strickler and Henderson spent the afternoon at the Valley Mall and were last seen leaving the mall at about 6:45 p.m. (JA 34).

Strickler had been spotted earlier in the afternoon trying to steal a car from the mall parking lot and he subsequently was identified at 7:30 p.m. as he drove Dean's car into the field in which Whitlock was murdered. (JA 68). Unchallenged evidence also established that Whitlock was murdered "at an absolute maximum, six hours after she ate and probably much less than that." (JA 112). The medical examiner opined that Whitlock's murder could have occurred as little as an hour or two after she had eaten. (JA 112). Whitlock was murdered in the cornfield when her skull repeatedly was crushed with the 69-pound rock. Strickler concedes that after Whitlock's murder he drove Whitlock's car (Pet. Br. at 18) and this is confirmed by his fingerprints which were found throughout the vehicle. (JA 130). It also is undisputed that Strickler possessed and unsuccessfully attempted to use Whitlock's bank card and that he gave Tudor the pearl earrings Whitlock was wearing on the night of her murder. Finally, according to Donna Tudor, on the night of January 5 Strickler spoke of a violent event earlier in the evening and admitted using a "rock crusher" on a "nigger." (JA 92-93).

As the Virginia Supreme Court found, the evidence overwhelmingly established that Whitlock was murdered during the commission of an armed robbery. *See Strickler*, 452 S.E.2d at 653. Stoltzfus' testimony was completely unrelated to that conviction. It cannot be said, therefore, that there is a reasonable probability that the result of Strickler's trial would have been different had Stoltzfus been "impeached" with the information Strickler belatedly developed and presented in his federal habeas action. *Bagley*, 473 U.S. at 687. There simply is "no reasonable doubt about [Strickler's] guilt whether or not the [impeachment] evidence is considered." *Agurs*, 427 U.S. at 112-113. Strickler, therefore, has not established "prejudice" to excuse his failure to raise his *Brady* claim in state court.[28]

Despite the overwhelming and independent record evidence of armed robbery, Strickler asserts, and the district court erroneously concluded, that Stoltzfus' testimony was somehow "critical" to the robbery predicate because, without it, there supposedly was no evidence that Strickler robbed Whitlock while he was armed with a deadly weapon.[29] (JA 394). The Virginia Supreme Court,

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[28] The uncontested, "non-Stoltzfus" evidence also overwhelmingly established that Strickler and Henderson abducted Whitlock to obtain Dean's vehicle and then murdered her shortly thereafter.

[29] The district court concluded and Strickler argues that Stoltzfus was the critical witness for the armed robbery predicate based on what she observed in the parking lot because the Commonwealth briefly argued in closing that Whitlock may have been looking at a knife when she looked down toward her side as Strickler sat beside her in the car. (JA 394). Strickler, however, clearly overstates his case when he argues that the prosecutor's evidence of armed robbery flowed "almost entirely from Stoltzfus." (Pet. Br. at 35). The Commonwealth's summation also cited the testimony of Strickler's own mother

however, found as a matter of historical fact, that the evidence was "overwhelming that Strickler committed the willful, deliberate and premeditated killing of Leanne Whitlock in the commission of robbery ***while armed with a deadly weapon.***" The state court also concluded that the 69-pound rock with which Strickler and Henderson killed Whitlock constituted a deadly weapon as a matter of Virginia law. *Strickler*, 452 S.E.2d at 653 (emphasis added). Although federal law required the district court to defer to the state court findings of historical fact, *see Sumner v. Mata*, 449 U.S. 539, 546-549 (1981); former 28 U.S.C. § 2254(d), and to the Virginia Supreme Court's determination of a matter of state law, *see Estelle v. McGuire*, 502 U.S. 62, 67 (1991), the district court ignored both of these fundamental precepts of federal collateral review.[30]

Strickler also asserts that the Stoltzfus documents were material because Stoltzfus "portrayed Strickler as

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that Strickler "always" carried a knife with him, as well as the testimony of Donna Tudor who placed a knife in Strickler's possession later in the evening. (JA 170).

[30] Strickler erroneously asserts that, despite the Virginia Supreme Court's conclusion that the rock constituted a deadly weapon as a matter of Virginia law, the respondent is not free to rely on the "rock theory" of armed robbery because such a theory supposedly was not argued at trial. In closing argument, however, the Commonwealth argued:

> So it is really no doubt about where it happened and what the murder weapon was. It was not a gun, it wasn't a knife. It was this thing here, it is to [sic] big to be called a rock and to [sic] small to be called a boulder. I don't know what you call it, I'll just call it a rock but this rock here, sixty-nine pounds, was the murder weapon.

(JA 167-168). Obviously, if the rock was the murder weapon and the murder was committed during a robbery, Strickler was "armed" with the rock when he committed both the robbery and the murder.

the instigator" of the violent acts against Whitlock. (Pet. Br. at 36). Presumably, Strickler is asserting that without impeachment of Stoltzfus, the jury was more likely to believe that he was the person who repeatedly struck Whitlock in the head with the rock while Henderson restrained her. Donna Tudor, however, testified that Strickler told her shortly after the murder that ***he*** had used a "rock crusher" on "a nigger" so that "it" would not give him "any more trouble." (JA 92-93, 106). Under Virginia's capital murder law, moreover, it was immaterial whether it was Strickler or Henderson who dropped the rock on Whitlock's head while the other one held her down. Both were equally culpable and subject to the death penalty. Indeed, this was the primary point of law decided on Strickler's direct appeal to the Virginia Supreme Court.[31] *Strickler*, 404 S.E.2d at 235; *see also Coppola v. Commonwealth*, 257 S.E.2d 797, 806 (Va. 1979), *cert. denied*, 444 U.S. 1103 (1980).

Only when the "reliability of a given witness may well be determinative of guilt or innocence" does the nondisclosure of evidence affecting credibility violate the rule of *Brady*. *See Giglio v. United States*, 405 U.S. 150, 154 (1972); *Bagley*, 473 U.S. at 677. Here, it is impossible to conclude that the outcome of Strickler's trial would have been any different if Stoltzfus never even had testified, let alone if she had testified but merely been "impeached" as Strickler now suggests. Because the evidence in question

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[31] Strickler cannot rely on the fact that Henderson was convicted by a separate jury of only first-degree murder. Unlike Strickler's jury, Henderson's jury erroneously was instructed that it could not convict Henderson of capital murder unless the evidence established that he rather than Strickler had struck Whitlock with the rock. The fact that a different trial judge erroneously afforded Henderson a windfall has no bearing on Strickler's case or on the principle of Virginia law reaffirmed in his case on direct appeal.

was not "material" under *Bagley*, Strickler can show neither *Brady* error nor the "prejudice" required to excuse his procedural default.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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